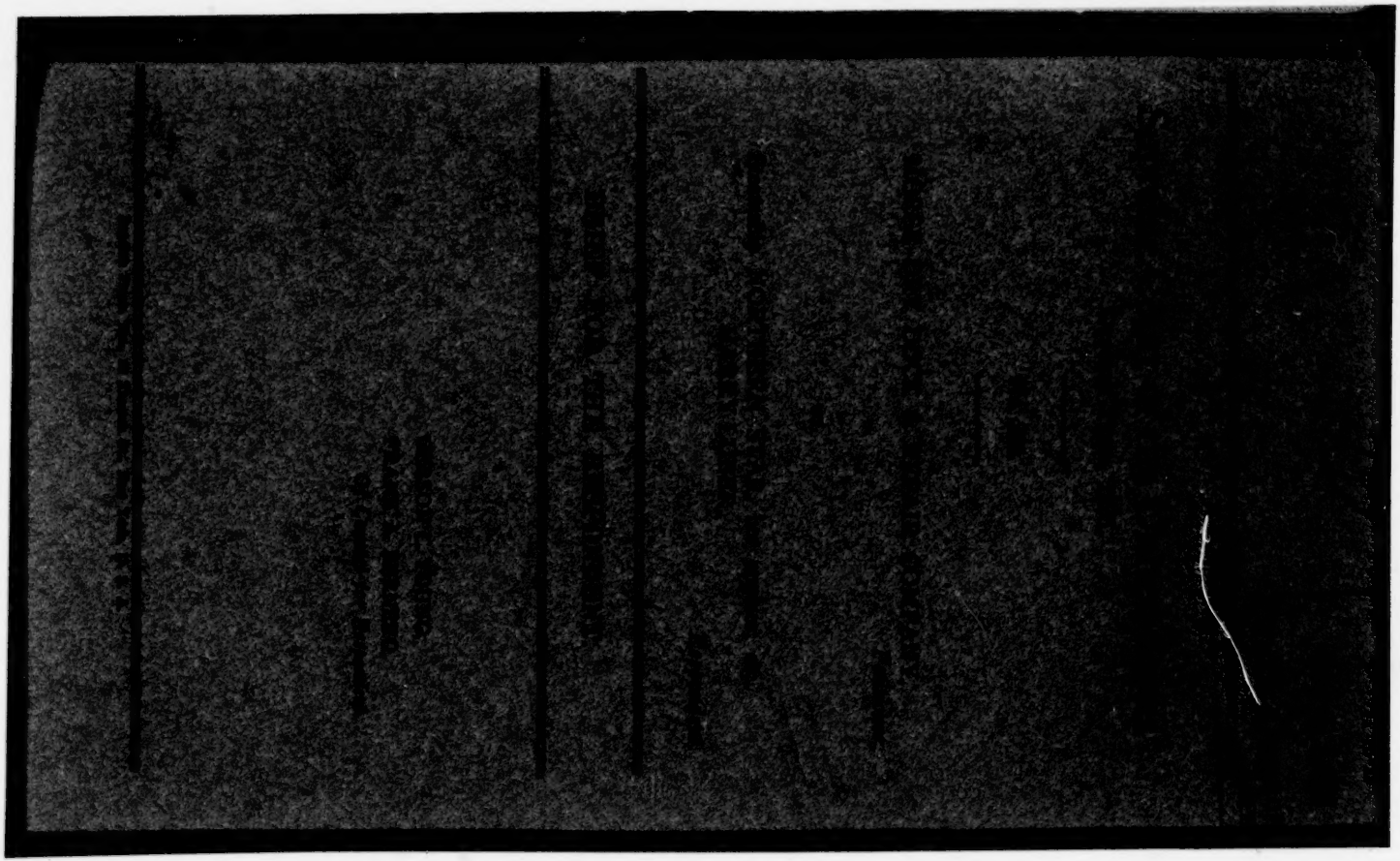

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SUPREME COURT OF THE UNITED STATES

MORSE DRY DOCK & REPAIR COMPANY, Petitioner, *vs.* Steamship NORTHERN STAR, her engines, etc.; HARRY LUBER, Respondent.	October Term 1925 No. 326

BRIEF ON BEHALF OF RESPONDENT.

STATEMENT.

This cause comes before this Court in pursuance of a writ of certiorari, issued on April 20, 1925, *Record*, p. 98, to review the decree in admiralty of the United States Circuit Court of Appeals for the Second Circuit in a case involving the right of the Morse Dry Dock & Repair Company to a maritime lien for repairs made to the Steamship *Northern Star* between November 14 and November 27, 1920, and the right of Harry Luber, the holder of a preferred mortgage, to priority over any lien the repairman might have.

The District Court for the Eastern District of New York held that the repairman did not have a maritime lien and that the mortgage was a preferred mortgage, which gave its holder the right to the proceeds of sale of the steamer. *Opinion, Record*, pp. 60 to 66. *The Northern Star*, 295 Fed. 366.

The Circuit Court of Appeals held that the repairman was entitled to a maritime lien, but that the preferred mortgage lien was superior and that the holder of the preferred mortgage was entitled to the proceeds of sale of the *Northern Star* by reason of that priority. *Opinion, Record,* pp. 94 to 97. *The Northern Star,* 7 F. (2d) 505.

The Facts.

The statement of facts in the petitioner's brief is incomplete. The opinion of the Circuit Court of Appeals concisely states most of the important facts as follows, *Record,* pp. 94, 95:

> "The vessel was a former government owned ship and was sold to the American Star Line Inc. on August 9, 1920. The latter gave the United States of America a preferred mortgage and ten promissory notes in amount of $1,217,437.50, covering the balance due on the purchase price. The bill of sale of (and) the mortgage was (were) recorded at the Custom House at the Port of New York on August 11, 1920. When so given, the '*Northern Star*' was at sea. Upon its return to an American port, a certified copy of the mortgage was placed on board the vessel and kept with the ship's papers continuously from September 23, 1920. But the Collector of Customs did not endorse the mortgage upon the ship's papers until June 27, 1921. The appellant, between November 14th and November 27th, 1920, at the request of the American Star Line Inc., furnished repairs to the steamship at the Port of New York in the amount for which this libel is filed. On December 22, 1920, receivers were appointed for the

> American Star Line Inc., a New York corporation, because of defaults in this agreement of sale and the preferred mortgage. On August 4, 1923, the intervenor-appellee purchased the mortgage of the United States for $117,000. On August 2, 1923, the District Court entered an order permitting all persons claiming any interest in the *Northern Star* to file libels against the vessel and prosecute the same to the satisfaction thereof."

The words in parentheses are interpolated for greater clarity.

Additional facts of importance are that the repairs were furnished in the home port of the *Northern Star*, namely, the Port of New York, *Record*, pp. 20, 14, 35; that the Morse Dry Dock & Repair Company is a New York corporation having its office and principal place of business in New York City, *Record*, p. 1; and that the American Star Line, Inc. was also a New York corporation with its office and principal place of business in New York City at the time the repairs were made. *Record*, p. 62.

The proceedings leading to the sale of the vessel and the deposit of the proceeds of sale in the registry of the District Court are stated by the District Court as follows, *Record*, p. 62:

> "The said Steamship *Northern Star* was arrested by process of this Court by libel filed by W. S. Pendleton, Jr. & Company and Joseph A. Rubin, and subsequently sold under a decree in that suit. Before the sale of the said vessel in that suit the libellant herein filed a libel against the said steamship, and the said Harry Luber as the purchaser of said mortgage intervened in this suit."

The Issues.

Although the petitioner seeks to convey the impression in its brief before this Court that the only question is that of the status of the mortgage, *Petitioner's Brief*, p. 14, the first and most important question is whether the Morse Dry Dock & Repair Company has any maritime lien whatever.

That the question of the petitioner's right to a maritime lien, is the paramount issue in the case is shown by the assignments of error filed in the District Court by the Morse Dry Dock & Repair Company, *Record*, pp. 68, 69. The first three articles assign errors because the District Court held that the repairman did not have a maritime lien. The Sixth Article assigns further error on the same ground, *Record*, p. 68. Consequently four out of the eight articles of the assignments of error, including the first three, relate to the question whether the repairman has any lien against the vessel.

The real issues before this Court, therefore, are substantially, as stated by the Circuit Court of Appeals, as follows, *Record*, p. 95:

1. Whether the Morse Dry Dock & Repair Company has a maritime lien under the Maritime Lien Act of 1920 for the work, labor and services performed in repairs to the vessel.

2. Whether the mortgage has preferred status.

3. Whether the mortgage takes priority over the repairman's claim, even if the repairman has a maritime lien.

FIRST POINT.

THE MORSE DRY DOCK & REPAIR COMPANY HAS NO MARITIME LIEN WHATEVER AGAINST THE STEAMSHIP *Northern Star*.

At the outset, it is important to ascertain the relationship of the various parties to the Steamship *Northern Star*.

When the repairs in question were furnished to the vessel it was in the possession of the American Star Line, Inc. *Record*, p. 60. That company had purchased the *Northern Star* from the United States Shipping Board and had executed an agreement of sale on December 24, 1919, *Record*, pp. 81 to 93, and a preferred mortgage on August 9, 1920. *Record*, pp. 38 to 46.

Under both instruments the United States reserved the right to retake possession of the vessel upon the default of the American Star Line, Inc.

The agreement for sale required the American Star Line, Inc. to give the United States a mortgage in substantially the form annexed to the agreement. *Record*, pp. 82, 89-93. This form of mortgage, which in turn incorporated by reference the agreement for sale, provided that the United States of America should have the right to retake the vessel if the American Star Line defaulted in any of the payments of the balance of the purchase price or in the performance of any of the conditions of the mortgage or the purchase agreement. *Record*, pp. 90, 91. These provisions are as follows:

> "*But if default be made in such payment*, or in any one of such payments, *or if default be made in*

the prompt and faithful performance of any of the covenants, agreements and conditions herein contained, or of any of the terms, conditions and agreements of said Purchase Agreement, * * * the party of the second part thereupon may:

* * * * * * * *

"'(c) *Retake said vessel wherever the same may be found,* and hold, lease, operate or otherwise use or dispose of said vessel for such times and upon such terms as the party of the second part may deem to its best advantage.

'(d) *Retake said vessel wherever the same may be found* and sell the same free from any claim by the party of the first part in law, in equity, in admiralty or by statute.

* * * * * * * *

"When any right to retake said vessel shall accrue, *the party of the second part may retake the same wherever the same may be found without prior demand and without legal processes,* and for that purpose may enter upon any dock, pier or other premises where said vessel may be; the party of the second part may take possession of said vessel upon the high seas or in any port, harbor or other place; but without impairing the said right, the party of the first part agrees upon demand to deliver said vessel at its own cost at such place or places as the party of the second part may designate * * *."

Substantially the same provisions giving the United States the right to retake the vessel are contained in the preferred mortgage subsequently executed on August 9, 1920 in Article 2, Section I (c) (d) (e), Section II. *Record,* pp. 42, 43. Finally, the preferred mortgage concluded with the following statement, *Record,* pp. 45, 46:

"Article III—Possession until Default

Until default shall have been made in the due and punctual payment of the interest or of the principal of any note or notes or of some part of such interest or principal, or *until some one or more of the events of default* hereinbefore described shall happen, the party of the first part shall be suffered and permitted to retain actual possession of the vessel, * * *."

It is obvious, therefore, that the status of the American Star Line, Inc., when the repairs in question were made was that of "an agreed purchaser in possession of the vessel" in the sense that that expression is used in Subsection R of the *Maritime Lien Act of 1920,* Act of Congress June 5, 1920, 41 Stat. 1005.

The District Court found as a fact, and this finding was not disturbed by the Circuit Court, that the repairs were ordered by a Mr. Garmey, an independent consulting engineer engaged by the American Star Line, Inc. to look after the repairing of its vessels. *Record,* p. 61. The bills for the repairs were made out to Garmey's firm, McFarlane & Garmey, *Record,* p. 19, and were sent by the Morse Dry Dock & Repair Company to Garmey's firm. *Record,* p. 11. Garmey in turn sent them to the American Star Line, Inc. *Record,* p. 16.

In these circumstances, Garmey was clearly an agent of the agreed purchaser in possession. He was not an employee of the American Star Line, Inc. but was an independent agent. Moreover he did not have any authority to pledge the credit of the vessel. His testimony in that regard, as a witness called by the petitioner, reads as follows, *Record,* p. 19:

"Q. Did you at any time in November, 1920, or prior thereto, have any authority from the American Star Line or its officers to pledge the credit of the vessel *Northern Star?*

"A. None whatever, excepting that I was authorized to go ahead and do work for them. That was pledging the credit, I presume.

"Q. I asked you not about pledging the credit of the American Line, Incorporated, but pledging the credit of the *Northern Star?*

"A. No.

"Q. You mean you had no authority of any kind to pledge the credit of the vessel?

"A. No.

"Q. You have no authority?

"A. No.

"Q. As to authority to pledge the credit of the American Star Line, Inc., is it correct to say that you had authority to pledge its individual credit for work to be done on the vessel?

"A. Yes."

It is apparent from the foregoing that Garmey did not actually pledge the credit of the *Northern Star* for repairs and had no authority to do so. Consequently, if the petitioner has a maritime lien it must be one that is presumed. It will be shown, however, that any such presumption is completely rebutted by additional provisions of the agreement for sale and of the mortgage, with notice of which the petitioner is charged.

I. *It is charged with notice of the terms of both the agreement of sale and the mortgage.*

As has been previously shown, the repairs were made at the vessel's home port, New York City, which was also

the principal place of business of the agreed purchaser in possession and of the Morse Dry Dock & Repair Company.

At the time the repairs were made there was on file at the office of the American Star Line, Inc., at 25 Beaver Street, New York City, a duplicate original of the agreement of sale. *Record,* p. 80. There was also on file at the Custom House at the Port of New York the original mortgage. *Record,* p. 9. Moreover, a certified copy of the mortgage was on board the vessel and remained there continuously up to the time of the marshal's sale. *Record,* pp. 61, 95.

Furthermore, the general superintendent and the assistant superintendent of the repair yard came on board the vessel daily while Garmey was there and discussed the repairs with him. *Record,* pp. 17, 18. Garmey knew at that time that there was a mortgage on the *Northern Star. Record,* p. 18.

They had had previous dealings and the Morse Dry Dock & Repair Company had previously made other repairs on the *Northern Star* and other vessels of the American Star Line. *Record,* pp. 16, 18.

It is very likely in these circumstances that the Morse Dry Dock & Repair Company actually knew of the mortgage and the agreement of sale. However, whether or not they actually knew of them the slightest inquiry on their part would have disclosed fully the terms of these instruments.

The American Star Line's office, being in the same city with that of the repair yard, was readily accessible for an examination of the agreement of sale. If the petitioner did not wish to offend the sensibilities of the American Star Line by requesting the details of that agreement, it could

have ascertained them from the Shipping Board which also had a duplicate original of the agreement of sale on file in its office. *Record*, p. 80.

So far as the mortgage was concerned, it was a matter of public record at the Custom House and the repair company could have examined it there without disclosing to anyone the purpose of its examination. If it did not wish to go as far as the Custom House, it could have procured a certified copy of the mortgage on board the vessel while repairing it. Since the general superintendent and the assistant general superintendent were on board the vessel while Garmey was there, they could have learned from him of the existence of the mortgage.

It is difficult to imagine a situation more favorable to charging a repairman with notice of provisions prohibiting the creation of liens.

Even before the passage of the Maritime Lien Acts of 1910 and 1920 this Court required repairmen and supplymen to exercise due diligence in ascertaining limitations on the right to liens, even where the repairs were made in foreign ports.

This rule was applied by this Court in *Thomas* v. *Osborn* (1856), 19 Howard (60 U. S.), 22, at pages 30 and 31, as follows:

> "But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that apparently such a case of necessity exists, are as ancient and well established as the authority itself.
>
> • • • • • • • • • •

> "To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. * * * *And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.*"

The same rule was confirmed in *The Lulu* (1869), 10 Wallace (77 U. S.), 192, at pages 203 and 204 as follows:

> "Viewed in any light it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, *unless it is shown* that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or *that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.*"

A similar statement of the rule is found in the same volume in *The Kalorama*, (1869), 10 Wallace (77 U. S.), 204, at pages 212 and 213. There it was said:

> "Where it appears that the repairs and supplies were necessary to preserve the ship in port, or to enable her to proceed on her voyage, and that they were made and furnished in good faith, the pre-

sumption is that the ship, as well as the master and owner, is responsible to those who made the necessary advances, and it is clear that the necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship, *unless it is shown that the master had funds or that the owner had sufficient credit, and that the repairers, furnishers, and lenders of the money knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.*"

Justice Harlan reaffirmed the established rule in *The Kate* (1896), 164 U. S., 458, at page 466:

"When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reasons urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken as between itself and the owner, to provide and pay for all supplies required by the vessel.

"*There are many cases in which the recognition or rejection of liens under the maritime law have depended upon the diligence of parties in ascertain-*

ing the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel."

After the passage of the Maritime Lien Act of 1920 this Court rendered its decision in *United States of America* v. *Amos D. Carver,* (1923), 260 U. S. 482, construing subsection "R" with relation to a charter party and held that the words "the charterers will not suffer nor permit to be continued any lien, etc." prohibited the creation of any lien in behalf of a material-man. Justice Holmes said at pages 489, 490:

"* * * We regard these words as too plain for argument. *They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation.* If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. *In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910.*

"But it is said that the charter party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter party contemplated the possibility of one being created and provided for its removal. *The South Coast,* 251 U. S., 519, is cited as establishing the position. But there is a sufficient

> difference in the language employed there and here to bring about a different result. In *The South Coast,* the contract went no farther than to agree to discharge liens within a month. *Here the primary undertaking was that 'the charterers will not suffer nor permit to be continued any lien,' etc. We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. But the primary undertaking is that a lien shall not be imposed. We are of opinion that the libellants got no lien upon the Clio, and* a fortiori *that the Morganza was free."*

The decision in *U. S.* v. *Carver,* has since been uniformly followed, under various facts, in the following cases: *The Admiral Goodrich* (9th Circ., 1923), 288 Fed., 363; *The Henry S. Grove* (W. D. Wash., 1923), 287 Fed., 247; *The New Rochelle* (N. D., Ohio), 1923, American Maritime Cases, 362; *The Ascutney* (4th Circ., 1923), 289 Fed., 802; *The Awensdaw* (C. C. A. 4th Circ., 1923), 289 Fed., 803; *The Thordis* (E. D., N. Y.), 1923 American Maritime Cases, 581.

Certainly Garmey's position was much less favorable than that of an agent in a foreign port or a master ordering repairs to the vessel abroad. He admitted he had no authority to pledge the credit of the vessel and he was in frequent communication with the American Star Line, Inc. *Record,* p. 19. Consequently, it should not be presumed that the Morse Dry Dock & Repair Company has a maritime lien merely because of Garmey's having placed the order. If it was the duty of repairmen in foreign ports to exercise diligence, certainly at least as rigid a test should be applied

o a repairman in the vessel's home port, which is also the principal place of business of both the agreed owner in possession and the repair yard.

The petitioner in the instant case therefore was required to use reasonable diligence in ascertaining whether the party ordering the supplies had authority to bind the vessel. By the exercise of such diligence it would have learned that the American Star Line, Inc., was without authority to create maritime liens on the steamship *Northern Star* because of the terms of both the agreement for sale and the preferred mortgage covering that ship. Consequently, the Morse Dry Dock & Repair Company is charged by law with notice that neither the American Star Line, Inc., nor any of its representatives could in law create any liens on the vessel.

II. The agreement of sale prohibited the creation of maritime liens on the vessel.

The petitioner in its endeavor to spell out a right to a maritime lien confuses a presumption with an established right. A presumption can be rebutted and, if it is rebutted, the right presumed does not accrue.

If the repair yard has any maritime lien for its bill, it must be because of the presumptions of Subsections P and Q of the *Ship Mortgage Act, 1920.* 41 Stat. 1005. However, these presumptions are qualified by the provisions of Subsection R of the Ship Mortgage Act. This is admitted by the petitioner on page 31 of its brief before this Court when it says "All of these sections clearly refer one to the other, and must be read together."

In the case of the *Northern Star,* the Morse Dry Dock & Repair Company either knew or should have known that

Garmey was without authority to bind the vessel. He not only had no authority from his principal, the American Star Line, Inc., but that company itself had no right to pledge the vessel's credit.

It will be noted that Subsection R specifically mentions an "agreement for sale of the vessel" as a source of limitation upon the authority to bind the vessel. In the case at bar, there is just such an agreement for sale which prohibits the creation of maritime liens on the *Northern Star*. *Record*, pp. 81 to 93.

This agreement of sale provided for the payment of a deposit of Fifty Thousand ($50,000) Dollars on account of said purchase price by the purchaser, the balance to be paid in various installments over a period of five years. *Record*, p. 82. It was also provided that a bill of sale be given the American Star Line, Inc., when 25% of the purchase price had been paid and that the American Star Line, Inc., give notes and a mortgage on the vessel to the United States of America for the balance of the purchase price. *Record*, p. 82.

In order to protect itself after the delivery of the bill of sale, the United States of America provided in the agreement for sale that *from the time of delivery of the bill of sale until the payment of all the notes given by the buyer, and until the performance of all other obligations on the part of the buyer, no lien would be created upon the vessel.*

The particular provisions setting up this limitation are contained in Article 6, subsections (e), (f) and (l), *Record*, pp. 83, 84, 85, 86, which read as follows:

> "6. From the time of delivery by the Seller of the bill of sale of said vessel, and until the payment

in full of the notes to be given by the Buyer, and until the performance of all other obligations of the Buyer hereunder, the Buyer agrees:"

* * * * * * *

"(c) *That the Buyer will not suffer or permit to be continued any lien, encumbrance or charge* which has or might have priority over the mortgage of said vessel to the Seller; but the Buyer will in due course, and in any event within thirty days after the same becomes due and payable, pay, discharge or make adequate provision for the satisfaction or discharge of all lawful claims or demands which, if unpaid, might in equity, in admiralty, at law or by any statute of this or any other nation where said vessel may be navigating or berthed, have such priority over the said mortgage, or might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port;"

* * * * * * *

"(f) * * * *The Buyer shall* take such other appropriate steps as designated to it by the Seller from time to time or required by the circumstances, as will *give notice to the world* that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and *that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens* or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel."

* * * * * * *

"(l) *That the Buyer will not,* without written consent of the Seller first obtained, make any * * * *pledge* or other transfer of *said vessel* or of any interest therein."

Subsection (3) of Article 6 of the agreement for sale in the very first clause uses substantially the same language construed by this Court in *United States* v. *Carver*, 260 U. S. 482, namely, "That the Buyer will not suffer or permit to be continued any lien, encumbrance or charge * * * ." This language was held by this Court in the *Carver* case to prohibit the creation of any lien. The succeeding words, "which has or might have priority over the mortgage of said vessel to the Seller," still further substantiate this interpretation. The form of mortgage annexed to the agreement for sale was an ordinary mortgage, there being no provision of law at that time for preferred mortgages and any maritime lien would have taken precedence over an ordinary mortgage. Consequently, when the agreement provided that no lien, encumbrance or charge, which might take priority over the mortgage could be created by the buyer, the effect of the provision was to prohibit any maritime liens.

Subsection (e) of Article 6 of the agreement for sale also provided that the buyer should in due course and in any event within thirty days discharge all lawful claims which "might operate as a lien, encumbrance or charge upon said vessel, or cause its detention in port." This is further convincing proof that it was intended by the agreement for sale to keep the vessel clear of all liens.

Subsection (f) of Article 6 of the agreement for sale still further evidences this intent, for it requires the buyer to "give notice to the world that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might

be deemed superior to, or a charge against, the interest of the Seller in said vessel." It will be noted that this clause repeats the fact that the vessel "is subject to the said mortgage and to this agreement" and uses again the language of the charter party construed in the *Carver* case in the provision that the buyer has no right, power or authority "to suffer or permit to be imposed on or against said vessel any liens."

Conclusive evidence of the intent to prohibit the creation of liens is found in subsection (l) of Article 6 of the agreement for sale. That subsection provides "that the Buyer will not, without written consent of the Seller first obtained, make any * * * pledge or other transfer of said vessel or of any interest therein."

Consequently neither the American Star Line nor its agent, Garmey, had the right to impose any lien on the *Northern Star* for the repairs done by the Morse Dry Dock & Repair Company. Such a right was absolutely denied the agreed purchaser in possession by the real owner, the United States of America under the foregoing agreement.

The effect of these prohibitions is not reduced in any way by the petitioner's argument that the presumption is conclusive against the owner. *Petitioner's Brief*, pp. 31 to 33. The fact has been demonstrated that the American Star Line was not the owner of the *Northern Star*, but was merely an "agreed purchaser in possession." Such an "agreed purchaser in possession" is specifically mentioned in Subsection R just before the provision requiring the exercise of diligence in ascertaining the limitations of the right to maritime liens. Consequently, the American Star

Line, Inc. was just such a person as the draftsman had in mind in preparing the act. Moreover, the last part of Subsection R specifically mentions an "agreement for sale" as a source of a limitation against liens.

In these circumstances, the petitioner must be held to be barred from the right to a maritime lien by the provisions of an agreement for sale. Such a holding would not be new to it because the Circuit Court of Appeals for the Second Circuit applied the same doctrine against the Morse Dry Dock & Repair Company in another case besides the *Northern Star,* namely *The Princess Matoika* (1924), 1 F (2d) 233. There the court said at pages 238, 239:

> " * * * And it is our opinion that while the libellant did not know that the Steamship Company was without authority to bind the vessel it might readily have ascertained the want of authority to do so if it had exercised the 'reasonable diligence' in making the inquiry, which it was its duty under the Statute to make. *The libellant* chose to rely upon a statement made to it by an officer of the Steamship Company which had the vessels in its possession but did not ask to see the papers which conferred upon it its right of possession, and it *made no inquiry of the United States Shipping Board or of the Government of the United States from which the Steamship Company acquired whatever rights it had in the ships. If it had made the least effort to ascertain the facts it would have known that the Steamship Company could not create a lien on the vessels.* In choosing to rely solely upon the loose statements made to it by an officer of the Steamship Company it did so at its own risk and must abide the consequences. *The facts were readily ascertainable, the inquiry into the facts was a duty under the*

Statute. And when a duty to make inquiry exists it must appear that the one whose duty it was to inquire prosecuted his inquiry with all the care and diligence required of a reasonably prudent man.

* * * * * * * *

"The principle involved in this case seems to us somewhat analogous to that involved in the cases above considered. In both classes of cases there is the duty to make inquiry and that duty is not discharged by accepting the statement of an interested party without any examination of the title papers which would have disclosed a want of power to create a lien upon the property involved."

The Circuit Court of Appeals for the Fourth Circuit has applied the same doctrine in substantially the same situation as that in *The Princess Matoika.* In *The Moosabee* (1924), 1F (2d) 964, the libellant sued to recover for repairs and supplies furnished to the vessels and relied upon a statement made by the officers of the company ordering the repairs and supplies that the corporation was the owner of the vessels. Judge Woods, writing the opinion for the court, said at page 965:

"The libellant, the P. H. Gill & Sons Forge & Machine Works, assigns errors in the decrees of the District Court dismissing its libels setting up claims against the United States, owners of the Steamship *Morganza* and *Moosabee* for repairs and supplies.

"Both vessels were owned by the United States and operated by the States Steamship Corporation under charter contracts with the Shipping Board containing options of purchase. The contract for the *Morganza* was in writing, with the familiar provision:

" 'The charterers will not suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over the title and interest of the owner in said vessel.' "

• • • • • • • •

"The affidavits of the officers of the libellant show that they knew the ships had been built by the Shipping Board and possession acquired from it by the States Steamship Corporation. *The absence of any authority of the States Steamship Corporation to place a lien on the vessels would have appeared by any inquiry either of the officers of the States Steamship Corporation or of the Shipping Board or by inspection of the ships' documents; but no inquiry was made.* The cases fall clearly within *The Clio-The Morganza, United States* v. *Carver*, 47, 260 U. S., 482, and *The St. Johns, Colonial Beach Company* v. *Quemahoning Coal Company*, 260 U. S., 707; *Northern No. 44, Deibert Barge-Building Company* v. *United States* (4th Circuit), 289 Fed., 805; *The Princess Matoika, Morse Dry Dock & Repair Company* v. *United States* (2nd Circuit), 1924 A. M. C., 1033; *Standard Oil Company* v. *United States* (4th Circuit), (opinion this day filed); *Frey & Sons, Inc.* v. *United States* (4th Circuit), (opinion this day filed).

"Affirmed."

Certainly, if it was the duty of the libellant in *The Princess Matoika* and *The Moosabee* to ascertain the right, if any, to bind the vessel by inquiring of the corporation ordering the repairs or of the Shipping Board, it was even more so the duty of the petitioner in the case at bar to make inquiry of the American Star Line, Inc., or the Shipping Board, particularly since no representation whatsoever was made as to the right to bind the vessel.

The petitioner may argue that *The Princess Matoika* and *The Moosabee, supra,* are cases of charter sales agreements and are therefore not applicable to the case at bar. However, there is no difference in principle between a charter sales agreement and a conditional sales agreement.

Moreover, it has been specifically held twice by the Circuit Court of Appeals for the Fourth Circuit that the same principle applies to an agreement for sale of a vessel, whose terms were less favorable than those of the agreement covering the *Northern Star.*

Frey & Son, Inc. v. *United States of America* (C. C. A., 4th Circ., Sept. 29, 1924), 1 F (2d) 963.

Standard Oil Co. v. *United States, et al.* (C. C. A., 4th Circ., Sept. 29, 1924), 1 F (2d) 961.

In *Frey & Sons, Inc.* v. *United States of America, supra,* Judge Woods said at page 964:

> "The point is pressed that the following provision of the contract of sale did not forbid a lien for supplies, but on the contrary contemplated that such a lien might be created, which the purchaser undertook to remove within fifteen days:
>
> 'The Buyer shall not suffer to be continued any lien or charge having priority to or preference over the title of the Seller in the vessel, or any part thereof, but will in due course and in any event within fifteen (15) days after the same becomes due and payable, pay or cause to be discharged or make adequate provision for the satisfaction or discharge of all lawful claims or demands which might in equity, in admiralty or at law or pursuant to any statute have precedence over the title of the Seller

as a lien or charge upon the vessel, or any part thereof, or cause the vessel to be released or discharged from any lien therefor, * * * always, however, subject to the condition that the vessel be discharged from any libel, attachment or other detention under process or color of legal authority within fifteen (15) days from the time when same attaches. If the vessel shall be libelled, attached or seized under writ or process in any judicial proceeding, the Buyer shall forthwith notify the Seller in writing of such proceedings and shall forthwith proceed to take such steps as will release the vessel from such writ or process by filing an undertaking, stipulation or otherwise as may be permitted.'

"The argument is that this provision brings the case under the reasoning and decision in the *South Coast* case, 251 U. S., 519, and not under *United States* v. *Carver*, 260 U. S., 482, 489. There may be doubt whether this provision of the contract standing alone forbade the creation of any lien on the vessel by the conditional purchaser; but we think *all doubt is dispelled by another provision of the contract for the sale of the vessel*:

'The Buyer agrees to carry a properly certified copy of this agreement with the ship's papers and to take such other appropriate steps designated to it by the Seller from time to time as required by circumstances as will give notice to the world that the Buyer has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against the interest of the Seller in the vessel.'

"*The contract of sale forbade the creation of a lien on the vessel by the conditional purchaser.* The libellant knew that there was a conditional contract

of sale, and that the purchase money had not been paid, and it was charged with inquiry as to its terms. *The Clio-The Morganza; United States* v. *Carver,* 260 U. S., 482, 489; *The St. Johns, Colonial Beach Company* v. *Quemahoning Coal Company,* 289 Fed., 805; *The Princess Matoika; Morse Dry Dock & Repair Company* v. *United States* (2nd Circuit), 1924 A. M. C., 1033; *The Moosabee, P. H. Gill & Sons, etc.* v. *United States* (4th Circuit), (opinion filed this day); *Standard Oil Company* v. *United States* (4th Circuit), (opinion filed this day)."

Reaffirming this doctrine in *Standard Oil Company* v. *United States, et al., supra,* Judge Woods said at page 961:

"*The Shipping Board delivered the vessels mentioned to the Atlantic, G. & P. S. S. Corporation under identical conditional contracts of sale* dated September 24, 1920, November 5, 1920, January 19, 1921 and February 28, 1921, which contained these provisions:

'The Buyer shall not suffer to be continued any lien or charge having priority to or preference over the title of the Seller in the vessel, or any part thereof, but will in due course and in any event within fifteen (15) days after the same becomes due and payable, pay or cause to be discharged or make adequate provision for the satisfaction or discharge of all lawful claims or demands which might in equity, in admiralty or at law or pursuant to any statute have precedence over the title of the Seller as a lien or charge upon the vessel, or any part thereof, or cause the vessel to be released or discharged from any lien therefor * * *.'

"The contract required the purchaser

'To carry a properly certified copy of this agreement with the ship's papers and to take such other

> appropriate steps designated to it by the Seller from time to time as will give notice to the world that the Buyer has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against the interest of the Seller in the vessel.'
>
> "We have held in *The Moosabee, P. H. Gill & Sons Forge and Machine Works* v. *United States* (4th Circuit), (opinion filed this day), that *these contract provisions forbade the conditional purchaser to place liens on the vessels.*"

It will be noted that the agreement for sale in each of the foregoing cases contained the expression, "the Buyer shall not suffer to be continued any lien or charge * * *," which differs from the expression used in the *Carver* case that the Buyer "shall not suffer nor permit to be continued any lien, encumbrance, or charge * * *." Nevertheless, the Circuit Court of Appeals for the Fourth Circuit held that in view of the other provisions of the agreement for sale, the principle of the *Carver* case was applicable and no liens could be created on the vessels.

In the case at bar, the agreement for sale contains substantially the same expression as that in the *Carver* case, "that the Buyer will not suffer or permit to be continued any lien, encumbrance or charge * * *" (*Record,* 84).

It also contains substantially the same additional provisions which resolved all doubts for the Circuit Court of Appeals for the Fourth Circuit in *Frey & Son, Inc.* v. *United States, supra,* "* * * the Buyer shall take such other appropriate steps as designated to it by the Seller from time to time or required by the circumstances, as will give notice to the world that the Buyer's right, title and interest in the

said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel" (*Record,* 85, 86).

Finally, the agreement for sale in the case at bar contains the further provision:

> "That the Buyer will not, without written consent of the Seller first obtained, make any * * * pledge or other transfer of said vessel or of any interest therein" (fol. 264).

In these circumstances, the *Carver* case is even more applicable to the case at bar, since there is no doubt whatsoever about the meaning of the foregoing provisions of the agreement for sale. The fact that the first provision is almost identical with the clause construed in the *Carver* case, the fact that the second of the foregoing provisions is almost identical with the one that resolved any doubt for the Circuit Court of Appeals for the Fourth Circuit and the fact that the third is virtually conclusive, leave no room for speculation.

Even if the petitioner did not know of the agreement for sale it would be charged with notice of its terms and would be held not to have a lien because of its failure to make inquiry. This was held by Judge Dickinson in the *John Baizley Iron Works* v. *United States,* E. D. Pa., Feb. 7, 1925, 6 F (2d), 25, a case also involving an agreement of sale, in which he said at page 26:

> "There are expressions in the act and in some of the opinions accompanying the rulings made which

are sometimes read to mean that the finding must be made that the inquiry would have resulted in knowledge. This is a misreading of the language of the act and of the opinions. No court is expected to ascribe to itself the gift of prophesy, for no one could foretell what would be the result of an inquiry. What would have been the result of the inquiry is not the point. The point is that inquiry must be made, if there was the absence of the power to pledge to be learned. If there was nothing to deny the power, this provision of the act has no application. *When there is, as here, an agreement of sale denying the power, inquiry must be made.* If an inquiry had been made, but nothing learned, then the finding would become one of its adequacy. The person ordering the repairs here had (barring the provisions of the agreement of sale), ample authority to bind the owners and the vessel.

"The libellant has in consequence a prima facie right of lien. This right, however, is qualified by the act of Congress by being subjected to the duty, before it becomes an absolute right, of inquiry into the existence of any agreement which denies the right. *The libellant here rested upon this primary qualified right, and made no inquiry into the existence of an agreement, thereby assuming the risk of its existence. Such an agreement did exist and it is destructive of the right of lien, which would otherwise exist. The cause is brought within the operation of two propositions. One is that, in the absence of a stipulation against liens, the libellant has a right of lien; the other is that, in the presence of such a stipulation and the absence of any inquiry into its existence, there is no right of lien. We look upon this cause as ruled by the Clio Case, U. S.* v. *Carver, supra.* The respondent, in addition to resting upon the absence of inquiry, introduced evidence of actual

knowledge of the existence of the stipulation against liens. Into this we have not gone."

The petitioner cannot brush aside the effect of this overwhelming line of authorities by the statement, *Petitioner's Brief*, page 34, that "If such an agreement ever existed, it was superseded and terminated by the execution of an absolute bill of sale and the giving of a mortgage."

In the first place, there can be no question about the existence of the agreement for sale because the petitioner stipulated that the agreement was duly executed and that a duplicate original was on file at the offices of the American Star Line, Inc. and another duplicate original was kept on file at the Shipping Board. *Record*, p. 80.

Moreover, the agreement for sale was not terminated by the giving of the bill of sale for the possession of the vessel by the American Star Line has been demonstrated to have been only conditional. It has been held repeatedly that despite the giving of a bill of sale the holder's title can be shown to be only conditional. *Morgan's Assignees* v. *Shinn* (1872) 82 U. S. 105; *Davidson* v. *Baldwin*, C. C. A. 6th 1897, 79 Fed. 95; *Everett* v. *United States*, C. C. A. 9th, 284 Fed. 203.

It should be especially noted that the agreement for sale particularly provided for the continuation of the prohibition against liens after the giving of the bill of sale. All of the restrictions against liens contained in Article 6 are preceded by the preamble, *Record*, p. 83:

> "From the time of delivery by the Seller of the bill of sale of said vessel, and until the payment in in full of the notes to be given by the Buyer, and until the performance of all other obligations of the Buyer hereunder, the Buyer agrees: * * *"

This provision leaves no doubt whatever that the restriction was intended by the parties to prevail even after the giving of the bill of sale. The fact that the Constitution of the United States guarantees the liberty of contract is sufficient answer to the astounding statement of the petitioner that "no agreement between the parties can change their status in law". *Petitioner's Brief*, p. 35.

The same contentions, made by the Morse Dry Dock & Repair Company in this case, against the application of the restrictions upon maritime liens after the giving of the bill of sale were made by an alleged lienor in the case of the *American Star*, decided by the Circuit Court of Appeals for the Third Circuit on March 1, 1926, and reported as yet only in 1926 American Maritime Cases 516.

That was a case involving identically the same type of agreement made between the same parties as the agreement for sale on the *Northern Star*. In writing the opinion for the Court, Judge Davis said at p. 520:

> "Does the appellant have a lien for the coal and supplies furnished second to the lien of the mortgage? The presumption is that a lien arises when necessary supplies are furnished to a vessel on the order of the owner or master and it shall not be necessary to allege or prove that credit was given to the vessel. Any one who denies the existence of such a lien has the burden of establishing the contrary. Section P of the Ship Mortgage Act of June 5, 1920; *Yankee*, 233 Fed. 919. The agreement of sale contained the following provision:
>
> 'That this agreement will be carried as part of the ship's papers; and that the Buyer shall take such other appropriate steps, as designated to it by the Seller from time to time or required by the circum-

stances, as will give notice to the world that the Buyer's right, title and interest in the said vessel is subject to the said mortgage and to this agreement, and that the Buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the Seller in said vessel.'

An inquiry by the appellant would have disclosed the information it contained. The sale had been completed and the agreement in a sense, as appellant contends, 'had ceased to be operative before the supplies were furnished' but it nevertheless showed that the Seller still had an interest in the vessel and that the Buyer had 'no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims' which might be deemed superior to the interest of the Seller; and this very claim is so deemed by the libellant and shows the wisdom of incorporating the provision into the agreement.''

The Court concluded at page 521:

> ''It was the duty of the appellant to exercise reasonable diligence to ascertain whether the master had authority to impose a lien on the vessel, and if it had done its duty, it would have ascertained that both the agreement and mortgage prohibited him from doing so.''

The foregoing case is directly in point with the case at bar and the remarks of Judge Davis entirely dispose of the specious theories advanced by the petitioner to circumvent the agreement for sale.

III. The mortgage prohibited the creation of maritime liens on the vessel.

In addition to the restrictions against liens contained in the agreement for sale, there are similar prohibitions in the mortgage.

It will be recalled that the original of this mortgage was on file at the Custom House in the very port where the repairs were made, that a certified copy was on board the vessel while the repairs were being made and that Garmey, who ordered the repairs, knew about the mortgage.

It is also noteworthy that Garmey had had previous dealings with the Morse Dry Dock & Repair Company and particularly with Murray, the general superintendent and Hallock, the assistant general superintendent. *Record*, pp. 17, 18. It hardly seems possible that in the course of these dealings neither Murray nor Hallock learned anything about there being a mortgage on the *Northern Star*.

Although both Murray and Hallock were material witnesses, the petitioner failed to produce them upon the trial. *Record*, pp. 12, 22. It is well established that the failure to produce material witnesses or important evidence gives rise to the presumption that their testimony or the effect of the evidence would be unfavorable to the party failing to produce them.

The following are some of the authorities sustaining the rule: *The New York*, 175 U. S., 187, 204; *Runkle* v. *Burnham*, 153 U. S., 216, 228; *The Colon*, 241 Fed., 592, 593; *The Bertha F. Walker*, 220 Fed., 667, 669; *Consolidated Coal Co.* v. *Knickerbocker Steam Towage Co.*, 200

Fed., 840, 845; *Norquet* v. *Paramount Worsted Mills,* 177 *Fed.,* 970, 975; *The Degama,* 150 Fed., 323, 324; *Choctaw & M. R. Co.* v. *Newton,* 140 Fed., 225, 238; *The Georgetown,* 135 Fed., 854, 859; *American Bell Tel. Co.* v. *National Tel. Mfg. Co.,* 109 Fed., 976, 1018; *The Alpin,* 23 Fed., 815, 816; *The Fred M. Laurence,* 15 Fed., 635.

Consequently the presumption is justified in the case at bar that if Murray and Hallock had been called to testify they would have been obliged to admit that the Morse Dry Dock & Repair Company knew about the mortgage.

Whether or not the petitioner actually knew about the mortgage, it is fully charged with notice of all its terms under the circumstances of this case.

The creation of maritime liens at any time was expressly prohibited by the following provisions of the preferred mortgage. *Record,* pp. 40, 41, 42:

"Article I.

Particular Covenants of the Party of First Part.

The party of the first part, the American Star Line, Inc., covenants and agrees as hereinafter in this Article set forth;"

* * * * * *

"Section III. *Not to suffer nor permit to be continued any lien,* encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part; * * *"

* * * * * *

"Section VI. To carry a properly certified copy of this mortgage with the ship's papers; and to take

> such other appropriate steps, as designated to it by the party of the second part from time to time or required by the circumstances, as will *give notice to the world* that the party of the first part's right, title and interest in the vessel is subject to this mortgage, and that *the party of the first part has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens* or claims which might be deemed superior to or a charge against, the interest of the party of the second part in the vessel."

There can be no doubt that these provisions expressly prohibit the creation of liens on the *Northern Star*. Otherwise they would not require the giving of notice by the American Star Line, Inc. to the world that it "has no right, power nor authority to suffer or permit to be imposed on or against the vessel any liens or claims which might be deemed superior to or a charge against, the interest of" the United States of America in the vessel.

The American Star Line, Inc., at the best, was in the position of a conditional vendee or agreed purchaser in possession, for, although the United States of America through the Shipping Board had given it a bill of sale, conveying title to the vessel, at the same time it had procured from the American Star Line, Inc., the aforesaid mortgage, which gave the United States of America the right to retake possession of the steamer in the event of a default by the American Star Line, Inc., in the making of further payments on the purchase price of the vessel. This is shown by the following provisions of the mortgage, *Record*, pp. 43, 44:

"ARTICLE II.

DEFAULT.

SECTION I. In case any one or more of the following events herein termed events of default, shall happen, * * * then and in each and every case the party of the second part thereupon may:

* * * * * * *

(c) Retake the vessel wherever the same may be found, and hold, lease, charter, operate or otherwise use the vessel for such times and upon such terms as the party of the second part may deem to its best advantages;

(d) Retake the vessel wherever the same may be found and sell the same free from any claim by the party of the first part in law, in equity, in admiralty, or by statute, * * *

* * * * * * *

SECTION II. When any right to retake the vessel shall accrue, the party of the second part may retake the same wherever the same may be found without prior demand and without legal process, and for that purpose may enter upon any dock, pier or other premises where the vessel may be, and the party of the second part may take possession of the vessel upon the high seas or in any port, harbor or other place; * * *"

The repairs on the *Northern Star* were ordered by a marine engineer and surveyor who, it is conceded, was authorized by the American Star Line, Inc., to order the repairs, but had no authority to pledge the credit of the vessel. Although it is doubtful whether an order for

repairs given by a consulting engineer engaged by a conditional vendee would come within Subsection "P" or Subsection "Q" of the Ship Mortgage Act, even if it did, it would be subject to the provisions of Subsection "R" (41 Stat. 1005):

> "• • • but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor."

It has been previously shown that Subsection "R" qualifies Subsections "P" and "Q".

There can be no doubt that the mortgage falls within the clause "or for any other reason" contained in Subsection R as a source of limitations upon the creations of liens. In the first place, Subsection R is part of Section 30 of *The Merchant Marine Act, 1920*, Act of Congress 1920, Ch. 250, 41 Stat. 988, 1005. Section 30 provides in Subsection A "That this section may be cited as the 'Ship Mortgage Act of 1920' ". 41 Stat. 1000.

It would be preposterous to say that a mortgage is not included in the expression "or for any other reason" contained in the clause "a charter party, agreement for sale of the vessel, or for any other reason" when the very subsection embracing that provision is part of an act bearing the word "mortgage" in its title.

In the second place, under the *ejusdem generis* rule a mortgage would be included in the clause "for any other reason" following as it does the expression "agreement

for sale of the vessel", particularly, since a mortgage is usually given pursuant to an agreement for sale. In fact, the American Star Line, Inc. was required by the agreement of sale to give the mortgage in this instance. *Record*, 82.

Since Subsection R is by its terms made to apply to charter parties, which are not recorded, it is quite consistent and reasonable to apply it to a mortgage recorded at the Customs House of the vessel's home port. A recorded instrument is more properly the basis of notice than an unrecorded one.

Viewed from any angle, a written instrument duly executed between the seller and the buyer such as a mortgage is as good an "any other reason" for the prohibition against liens as could be found.

The mortgage was specifically held to come within that clause by the District Court in the case at bar when it said, *Record*, pp. 63, 64:

> "Under the law as hereinbefore quoted the libellant could not acquire a lien if it knew or by exercise of reasonable diligence could have ascertained that 'for any other reason' the person ordering the repairs, etc., was without authority to bind the vessel therefor.
>
> "The libellant claims that this does not apply to the owner but I cannot agree with that claim because the use of the words 'for any other reason' after the words 'a charter party, agreement for the sale of the vessel' show that they are to be construed broadly, and *much stronger reasons exist to limit the power of a corporation to bind a vessel and create maritime liens thereon where it has purchased the same and given a large purchase money mortgage, than in the case where there has been an agree-*

ment to sell a vessel which sale is not yet consummated.

"It would also seem to me that much less was required of libellant in this case where also the information could be acquired from public (*fol.* 135) *records than is required in case of a charter party which is not so recorded.*

"The terms of Subsection R seem to me to clearly show the intention to include the owner of the vessel among those who by their own agreements may be prohibited from binding the vessel because it says 'Nothing in this section shall be construed to confer a lien', which shows plainly that the prohibition referred to is not limited to any class named therein, or in any particular subsection, but it is to be construed in connection with the whole of Section 30, including of course Subsections P and Q. This also further appears to be the true construction because when it was intended to refer only to a particular subsection, it was done as appears early in Subsection R, where the word 'section' was not used but it says 'specified in Subsection Q'.

"This construction is also strengthened by the fact that Subsection R specifies 'the terms of * * * agreement for sale of the vessel' as a source from which it may be learned that there is no authority to bind the vessel, because the terms of agreement for the sale of the vessel would bind the seller as well as the purchaser, and if the owner who was making the sale remained in possession, he would be the one who would by the terms of the agreement be deprived of authority to bind the vessel.

"Holding therefore as I do that by their terms of said mortgage the American Star Line, Inc., was prohibited from creating a maritime (*fol.* 136) *lien for the repairs made by the libellant, and that such prohibition comes under the term 'for any other*

reason' as set forth in said Subsection R, there can be no doubt that had libellant exercised reasonable diligence, it could have ascertained the fact, because inquiry at the office of the American Star Line, Inc., the records of the Collector's Office in the Custom House, both in New York City, of Mr. Garmey, or of the captain or officer in charge of the ship, would have furnished libellant with complete information.

"No evidence was offered to show that any inquiry was made and no one connected with the libellant whose duty it was to make such inquiry was produced, and therefore I find that no such inquiry was made, and under the terms of the statute the libellant did not acquire a maritime lien on said vessel for the making of such repairs.

"*United States* v. *Carver,* 1923 A. M. C. 47;
"*The Buckhannon,* 1923 A. M. C. 645;
"*The Admiral Goodrich,* 288 Fed. 362;
"*The Ascutney,* 289 Fed. 802;
"*The Awensdaw,* 1923, A. M. C. 505;
"*The Northern No. 44,* 1923 A. M. C. 622."

The same holding was made by the District Court of New Jersey in *The American Star,* decided by Judge Lynch May 29, 1924, as yet reported only in 1924 American Maritime Cases 1064. There the Court said at pages 1066 and 1067:

"The libellant, in November, 1920, could, by the exercise of reasonable diligence, have ascertained that 'because of the terms of the * * * agreement for sale of the vessel or for any other reason, the person ordering the * * * supplies * * * was without authority to bind the vessel.' *The slightest sort of inquiry on the part of the libellant in this case would have revealed the existence of this 'preferred mortgage.' And a preferred mortgage, in my opin-*

ion, falls within the meaning of the words 'or for any other reason.' As to that, I quote from the very recent opinion of District Judge Campbell in the case of the *Northern Star,* 295 Fed.

'Under the law as hereinbefore quoted the libelant could not acquire a lien, if it knew or by exercise of reasonable diligence could have ascertained that "for any other reason" the person ordering the repairs, etc., was without authority to bind the vessel therefor. The libelant claims that this does not apply to the owner, but I cannot agree with that claim, because the use of the words "for any other reason" after the words "a charter party, agreement for the sale of the vessel," shows that they are to be construed broadly, and much stronger reasons exist to limit the power of a corporation to bind a vessel and create maritime liens thereon, where it has purchased the same and given a large purchase-money mortgage, than in a case where there has been an agreement to sell a vessel, which sale is not yet consummated.'

"With the views of Judge Campbell, I concur.

"The libel will be dismissed."

In affirming Judge Lynch's decision, the Circuit Court of Appeals for the Third Circuit after quoting Subsection R said in *The American Star, supra,* 1926 A. M. C. 516 at pages 520 and 521:

"This language did not leave the person furnishing supplies to rest on presumption, but called upon him to exercise reasonable diligence to ascertain whether or not because of the agreement of sale, 'or for any other reason,' the master was without authority to bind the vessel. *The existence of the preferred mortgage is the 'any other reason' why the master was without authority to bind the vessel for sup-*

plies and thus jeopardize the interest of the seller. Northern Star, 1924 A. M. C. 136, 295 Fed. 366.

"The mortgagor in the mortgage itself agreed 'not to suffer nor permit to be continued any lien, encumbrance or charge which has or might have priority over this mortgage of the vessel to the party of the second part.' This means that the mortgagor would not suffer any lien to be created nor permit one to be continued. *It was the duty of the appellant to exercise reasonable diligence to ascertain whether the master had authority to impose a lien on the vessel, and if it had done its duty, it would have ascertained that both the agreement and mortgage prohibited him from doing so.* It is therefore responsible for what a diligent inquiry would have revealed. *Moosabee, Gill* vs. *U. S.,* 1924 A. M. C. 1283, 1 F. (2d) 964; *Frey & Son Inc.* vs. *United States,* 1924 A. M. C. 1281, 1 F. (2d) 963; *Hoxie,* 1923 A. M. C. 937, 291 Fed. 599; *Standard Oil Co.* vs. *United States,* 1924 A. M. C. 1276, 1 F. (2d) 961; *Clio—Morganza, United States* vs. *Carver,* 1923 A. M. C. 47, 260 U. S. 482."

The preferred status of the mortgage is not inconsistent with restrictions against liens because there are some liens that might be superior to the preferred mortgage lien. *Subsection M of Ship Mortgage Act,* 41 Stat. 1004. In addition to the protection of a preferred mortgage, a mortgagee has the right to protect himself against any liens by requiring the mortgagor to agree not to create any.

That was what the Shipping Board did in the case of the *Northern Star* mortgage and the contractual provisions of that mortgage must be enforced. Hence the Morse Dry Dock & Repair Company was barred from having a maritime lien against the *Northern Star* by the terms of the mortgage as well as by the terms of the agreement for sale.

IV. Even if the contentions of the Morse Dry Dock & Repair Company are fully accepted, they merely confirm the fact that the petitioner cannot have a maritime lien on the vessel.

The petitioner lays great stress in its brief before this Court on its contention that the mortgage on the *Northern Star* is not a preferred mortgage. It also made the point that the mortgage does not prohibit all liens but only liens that might have priority over the mortgage.

In the first place, it is well established that every maritime lien takes priority over an ordinary mortgage. *The John Jay,* 1854, 17 How. (58 U. S.) 399. Therefore, if the mortgage on the *Northern Star* were only an ordinary mortgage the prohibitions contained in it against the creation of any incumbrance that might take priority over the mortgage mean that no maritime lien whatever can be created on the vessel.

In the second place the petitioner admits in its brief before this Court that the mortgage is valid even if it is not a preferred mortgage. *Petitioner's Brief,* p. 22. As a valid contract its terms must be enforced, including the provisions against the creations of liens. The lack of such preferred status would not invalidate the restrictions against maritime liens.

Even if these provisions are given the reduced effect suggested by the petitioner, they, nevertheless, are sufficient to prevent the creation of any maritime lien whatever, because any maritime lien would come ahead of an ordinary mortgage. Therefore none can be created under that prohibition.

Thus, the petitioner finds itself in a dilemma, for, even the interpretation most favorable to it, nevertheless bars it from a maritime lien.

SECOND POINT.

SINCE THE MORSE DRY DOCK & REPAIR COMPANY HAS NO MARITIME LIEN AGAINST THE "NORTHERN STAR", THE MORTGAGEE IS ENTITLED TO THE PROCEEDS OF SALE OF THE STEAMER.

Putting aside for the time being the question whether the mortgage has preferred status, it nevertheless entitled the holder Luber to the proceeds of sale of the *Northern Star.*

Even as an ordinary mortgage, it comprises at least a common law lien against the fund in the registry of the Court, whereas the petitioner, having no lien whatever, cannot in any event be paid out of that fund. His claim unsupported by any lien is merely a personal debt of the American Star Line, Inc.

These principles are established by the decisions in *The J. E. Rumbell* (1892), 148 U. S. 1; and *The Rupert City* (D. C. Wash. N. D. 1914), 213 Fed. 263.

In *The J. E. Rumbell* (1892) 148 U. S. 1, a case in which a lien for repairs in the vessel's home port given by state statute was given preference over an ordinary mortgage, Justice Gray said at page 15:

> "An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose

it, or to assert either title or right of possession under it. *The John Jay,* 17 How. 399; *The Eclipse,* 135 U. S. 599, 608. But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the materialmen in this case. *The Globe* 3 How. 568, 573; *The Angelique* 19 How. 239; *The Lottawanna* 2i Wall. 558, 582, 583; Rule 43 in Admiralty."

The Rupert City (D. C. Wash. N. D., 1914), 213 Fed. 263, was a case in which questions as to priority between claims supported by maritime liens, claims supported by non-maritime liens including a mortgage, and claims not supported by any lien arose in connection with the distribution of proceeds of sale of a vessel in the registry of the court. There Judge Neterer said at page 266:

"It does not follow, as contended, however, that the mortgagee may not intervene and defend against the establishment of maritime liens against the vessel. These would deplete the fund on which he must rely, as the vessel when sold is discharged of his lien, and the mortgagee has a claim only upon the proceeds of sale. *Schuchardt* v. *Babbage* 19 How. 239, 15 L. Ed. 625; *The H. N. Emilie* (D. C.) 70 Fed. 511; *The Advance* (D. C.) 63 Fed 704; *The Old Concord,* Fed. Cas. No. 10,482; *The Mary Anne,* Fed. Cas. No. 9,195.

"(2) When the vessel is sold and the fund is in the registry of the court, after the payment of all maritime claims, the court will order the payment of such non-maritime liens as have been established, in

> the order of their priority. Claims not supported by liens cannot be paid out of the fund, since they are against the owner personally, and not against the fund. *The Advance* (D. C.) 63 Fed. 704, 706."

A similar holding was made by Judge Morrow in *The Katie O'Neil* (D. C., N. D. Cal., 1894) 65 Fed. 111, 113.

Since the Morse Dry Dock & Repair Company cannot be paid its claim from the fund in Court by reason of its not having a maritime lien, the holder of the mortgage Luber is entitled to payment of his claim out of the proceeds of sale of the vessel. However, his claim of over $1,000,000 greatly exceeds the total proceeds of sale. Consequently, he is entitled to the entire fund in the registry of the Court.

THIRD POINT.

EVEN IF THE MORSE DRY DOCK & REPAIR COMPANY HAD A MARITIME LIEN AGAINST THE NORTHERN STAR THE PREFERRED MORTGAGE LIEN WOULD HAVE PRIORITY.

However, the petitioner's contention, that the mortgage is not a preferred mortgage, is not correct. It will be shown hereinafter that the mortgage should be given preferred status as of September 23, 1920 and that there cannot be even the shadow of a doubt that it has such status as of June 27, 1921. That being so, its holder is entitled to priority over the claim of the Morse Dry Dock & Repair Company, even assuming the latter has a maritime lien, unless the petitioner's claim constitutes a preferred maritime lien within the meaning of the Ship Mortgage Act.

At the outset it should be borne in mind that the World War gave American Shipping a tremendous impetus and an

almost national desire was stimulated to restore the American Merchant Marine to the proud basis it was on in the days of the clipper ships. In order to achieve such a restoration it was necessary to provide stable security to attract the large amount of capital required. Bankers, trust companies, large insurance companies and any other corporations with funds to invest were not disposed to invest their money in ships unless their investments could be secured by mortgages resembling in stability the mortgages on real property.

It was this desire to improve the security furnished by a ship mortgage that led to the passage of the Ship Mortgage Act. The ordinary ship mortgage of the past had been found to be very inadequate as security for large investments because of prior maritime liens that were likely to accrue after the giving of the mortgage and the cost of construction of vessels during and immediately after the World War mounted so high that few could be built without corporate investment. Such investment had to be adequately protected and the Ship Mortgage Act was intended to give that protection.

Another element that led to the passage of the Ship Mortgage Act was the fact that the close of the World War left the United States with large merchant marine tonnage of all classes on its hands. The opinion was general, that it was undesirable for the Government to continue to operate this tonnage for any longer period than would be required to sell the vessels to private owners with a prospect of their being operated privately as part of the merchant marine of the United States. It was obvious that such sales by the Government could not be accomplished

within a reasonable time unless some system were devised of part payment in cash with the balance of the purchase prices satisfactorily secured by adequate mortgages on the vessels.

Consequently the Ship Mortgage Act was passed with the principal purpose in view of protecting the mortgagee as the best means of building up the American Merchant Marine. This is conclusively shown by the title of the *Merchant Marine Act, 1920,* Act of Congress of 1920, ch. 250, 41 Stat. 988, of which the Ship Mortgage Act comprises Section 30. It is entitled "An Act to Provide for the Promotion and Maintenance of the American Merchant Marine, to Repeal Certain Emergency Legislation, and Provide for the Disposition, Regulation, and Use of Property Acquired Thereunder, and for Other Purposes."

It is no exaggeration to say that since that time billions of dollars have been invested by the Government and private corporations in ships in reliance upon the security of preferred mortgages.

The *Northern Star* is a good example. The purchase price in the agreement of sale between the United States and the American Star Line, Inc. was $215 per deadweight ton on the 7550 deadweight tons of the vessel, *Record,* p. 82, which amounts to approximately $1,623,250. The Government took back a mortgage of $1,217,437.50 after the payment of part of the purchase price. Even at the tremendously reduced values of steamers resulting from the slump in the shipping generally the last five years, Luber invested $117,000 when he purchased the mortgage from the Shipping Board. *Record,* p. 95.

The foregoing facts are important in connection with the interpretation of the mortgage on the *Northern Star.*

Although Congress unquestionably intended to afford the mortgagee every protection possible, it went about this purpose somewhat imperfectly so far as the language of the act is concerned. This is shown in some measure by the contention made by the petitioner at page 25 of its brief that the endorsement is to be made before the mortgage is recorded. It is true that Subsection D (a) (2) is susceptible to this interpretation. 41 Stat. 1001. Yet Subsection C states that a mortgage is not even valid until it is recorded. 41 Stat. 1000. This section is a reenactment with some changes of Revised Statutes, Section 4192. (Act of July 20, 1850, ch. 27, s1, 9 Stat. 440.) But in reenacting that statute Congress changed the word "unless" to "until". This change shows clearly that validity was intended to be withheld from even an ordinary mortgage until it was recorded. Under Subsection D (a) a mortgage must first be valid as an ordinary mortgage before it can become a preferred mortgage. Consequently, the recordation must be the first step taken in the entire process of creating a preferred mortgage.

Therefore, subdivision (a) (2) of Subsection D is inconsistent with Subsection C of the same act and the latter would probably be held to prevail. This is one of the most obvious imperfections of the act, which are due perhaps to legislative illustration of the old adage that too many cooks spoil the broth. A number of legislative draftsmen took a hand in preparing what finally became the Ship Mortgage Act and the result is not all that could be desired.

A more serious defect of the Ship Mortgage Act lay in its provisions concerning the documentation of vessels.

These provisions coupled with a number of decisions of the Courts created a situation in which considerable doubt arose as to what port should properly be the home port of a vessel. Some contended quite properly that under the old decisions prior to the Act, the home port must be a port in the state under whose laws the corporation owning the vessel is organized. Others contended just as stoutly that a corporation could register the vessel with its principal place of business as her home port, regardless of where the corporation was organized, and a number of preferred mortgages were actually placed on vessels documented in the latter type of home ports.

This led to decisions declaring invalid preferred mortgages, which were recorded at home ports other than those in the states in which the owner corporation was domiciled and which were recorded during a hiatus in the redocumentation of the steamer following her sale. *The Lincolnland,* 295 Fed. 358, 363; *The Susanna,* C. C. A. 4th, 1924, 2 F (2d) 410; *The Bergen,* 7 F (2d) 379.

To remedy this situation Congress passed the *Home Port Act* of February 16, 1925, ch. 235, 43 Stat. 947.

In that Act, Congress specifically validated the mortgages held invalid. It also validated the home ports now shown in the documents of any vessel of the United States. The Act provides in Section 3:

> "Sec. 3. *All conveyances and mortgages* of any vessel or any part thereof, and all documentations, recordations, indorsements, and indexing thereof, and proceedings incidental thereto heretofore made or done, *are hereby declared valid to the extent they would have been valid if the port or ports at which said vessel has in fact been documented from time*

> *to time had been the port or ports at which it should have been documented in accordance with law; and this section is hereby declared retroactive so as to accomplish such validation*: *Provided*, that nothing herein contained shall be construed to deprive any person of any vested right."

Section 5 of the same Act provides:

> "Sec: 5. All such provisions of the Navigation Laws of the United States and of the Ship Mortgage Act, 1920, otherwise known as Section 30 of the Merchant Marine Act, 1920, as are in conflict with this Act are hereby amended to conform herewith."

The portions of the Home Port Act making the validation retroactive demonstrate clearly the intent of Congress to protect the mortgagee at almost any cost.

I. The mortgage on the Northern Star has preferred status as of September 23, 1920, the date when a certified copy was placed on board the vessel with the ship's papers.

The Ship Mortgage Act was enacted on June 5, 1920. The mortgage on the *Northern Star* was executed on August 9, 1920, only a little more than a month after the passage of the act. *Record*, p. 46.

The Act provides that the Secretary of Commerce is authorized to make such regulations in respect to the recording and endorsing of mortgages covering vessels of the United States as he deems necessary to the efficient execution of the Act, Subsection W, 41 Stat. 1006. It is obvious that in the period of less than a month with no prior expe-

rience of a similar American act to go by, the Secretary of Commerce could not promulgate regulations for the various Collectors of Customs by the time that the *Northern Star* mortgage was presented to the Collector at New York for recordation and endorsement.

The *Northern Star* mortgage as a matter of fact was presented to the Collector at New York two days after its execution, namely, on August 11, 1920. *Record*, p. 9. He naturally did what he had been accustomed to doing for many years; namely, he recorded the mortgage. But, the ship being at sea the thought apparently did not occur to him again of endorsing it on the ship's papers until he was reminded by the regulations finally issued in June, 1921 that he should also have endorsed the mortgages on the ship's papers.

The Ship Mortgage Act required the Collector of Customs to make the endorsement on the ship's papers, Subsection D, Subdivision (d), 41 Stat. 1001. The same Subdivision provided that "no clearance shall be issued to the vessel until such endorsement is made". Since it is the duty of the Collector of the Port to furnish or refuse clearance to vessels, the latter provision still further confirmed the obligation upon him to make the endorsement. Finally, the Act imposes a penalty on him if any person suffers damage by entering into a contract upon the credit of a vessel, on which the Collector has failed to properly perform any duty required of him under the provisions of the Ship Mortgage Act. Subsection J (c), 41 Stat. 1003.

In the face of the foregoing provisions, the Shipping Board probably assumed, as indeed it was justified in doing, that the Collector would attend to the endorsement of the mortgage on the ship's papers. It is a fact that the

mortgage was sold by the Shipping Board to Luber for $117,000 on the representation that it was a preferred mortgage and it was not until after the mortgage had been foreclosed that either the Shipping Board or Luber learned that the Collector had not made the endorsement on the ship's papers until June 27, 1921.

It is a further provision of the Ship Mortgage Act that the Collector of Customs upon recording a preferred mortgage shall deliver two certified copies to the mortgagor, who shall place one copy on board the mortgaged vessel and cause it to be kept with the ship's papers and exhibited by the master whenever request is made of him. *Subsection E*, 41 Stat. 1001, 1002.

The Collector of Customs did give the mortgagor of the *Northern Star*, the American Star Line, Inc., the required certified copies of the preferred mortgage upon recordation of it, but the vessel was at sea at that time. *Record*, 61, 95. It is likely that the fact of the steamer being at sea contributed to the collector's oversight in not endorsing the mortgage on the ship's papers until June, 1921. At any rate, it was not possible for the mortgagor to place the certified copy with the ship's papers until the vessel arrived again in an American port on its voyage from Stockholm. However, immediately on the arrival at Norfolk of the *Northern Star* from Stockholm, the mortgagor placed a certified copy of the mortgage with the ship's papers and instructed the captain to exhibit it to anyone on request. *Record*, pp. 61, 95, 30 to 32, 26, 27, 50, 51. This certified copy remained with the ship's papers up to the time the *Northern Star* was sold by the marshal. *Record*, pp. 61, 30.

It is especially noteworthy that the Ship Mortgage Act provides for the inflicting of a penalty upon the mortgagor if he fails to comply with the requirements of Subsection J (c), 41 Stat. 1003, in addition to the penalty to be inflicted upon the Collector for any breach of the Act's requirements. But, nowhere in the Act is there any provision for imposing a penalty upon the mortgagee. This still further confirms the intent of Congress not to penalize the mortgagee. Indeed, the mortgagee by the very nature of things is powerless to alter the situation and compel the mortgagor or the Collector to perform his duties. *Record*, p. 97.

The situation, therefore, with respect to the *Northern Star* mortgage was that the mortgagee was not guilty of any fault and neither was the mortgagor. If the failure to endorse the mortgage on the ship's papers was the fault of anyone, it was that solely of the Collector of Customs.

The petitioner contends that there is no occasion to apply principles of statutory construction in the case at bar and maintains that the provisions of Subsection D are clear and unambiguous. A careful reading of Subdivision (a) of Subsection D, however, will show that it is well nigh meaningless.

It will be noted that Subsection D (a) begins as follows, 41 Stat. 1000, 1001:

> "A valid mortgage which, (sic) at the time it is made includes the whole of any vessel of the United States of 200 gross tons and upwards, shall in addition have, in respect of such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if——".

The placing of the comma after the word "which" in the first line makes a parenthetical clause of the expression "at the time it is made includes the whole of any vessel of the United States of 200 tons and upwards". With that descriptive and therefore unimportant parenthetical clause omitted, Subsection D (a) reads "A valid mortgage which shall in addition have, in respect to such vessel and as of the date of the compliance with all the provisions of this subdivision, the preferred status given by the provisions of Subsection M, if——". Since the remainder of the subdivision furnishes no verb for the noun "a valid mortgage" in the first line, the entire Subdivision (a) is absolutely meaningless and yet that is exactly what Congress enacted.

The very rules of statutory construction, on which the petitioner relies so heavily, make it impossible for this Court to put the comma at another place, so as to give Subsection D some revised meaning. It is no more possible to validate an invalid legislative enactment by judicial decision than it is to invalidate a valid act by judicial decision and the remedy, if any is necessary, which is denied, is an amendment by Congress such as the Home Port Act, *supra*. The Act has to be construed as it stands and, as it stands, Subdivision (a) of Subdivision D is an enigma.

Fortunately, the remaining provisions of the Ship Mortgage Act carry out the intent of Congress and make subdivision (a) of Subdivision D unnecessary. Subdivision (b) of Subsection D is clear in its provision that any mortgage which complies with the conditions of the subsection shall be called a "preferred mortgage". Subsection (c) of Subsection D gives the details as to the form of the

endorsement. Subdivision (d) of Subsection D gives the requirements as to how the endorsements shall be made and Subdivisions (e) and (f) contain provisions as to special types of endorsements. 41 Stat. 1000, 1001.

Subsections K, L, M and N are the essential provisions of the Ship Mortgage Act providing, as they do, that a preferred mortgage shall constitute a maritime lien and setting forth, as they do, the priority given a preferred mortgage lien and the procedure for enforcement of it. 41 Stat. 1003, 1004.

Consequently, even when Subdivision (a) of Subsection D is entirely eliminated as utterly meaningless, the remainder of Subsection D adequately covers the step of endorsement to which the entire subsection relates.

The elimination of Subdivision (a) does not nullify, therefore, any material or essential provision of the Ship Mortgage Act. On the contrary, it does away with a provision that is inconsistent with Subsections F and M protecting the mortgagee during the period between recording and endorsement. It is a step, therefore, in the direction of carrying out Congress' intention of protecting the mortgagee to remove an ambiguous and meaningless clause that might cause endless trouble to preferred mortgagees and reduce the security intended to be given them.

It is evident from other portions of the Act that Congress intended anyway to protect the mortgagee while the mortgage is being made a preferred mortgage, even during period between the recording and the making of the endorsement.

Subsection F provides that the mortgagor shall not, without the consent of the mortgagee, incur any con-

tractual obligation creating a lien with specified exceptions "before the mortgagee has had a reasonable time in which to record the mortgage and have endorsements in respect thereto made upon the documents of the vessel." 41 Stat. 1002. Subsection M which defines a "preferred maritime lien" says that that term means a lien arising "prior in time to the recording and indorsement of a preferred mortgage in accordance with the provisions of this section." 41 Stat. 1004.

These subsections show indisputably that Congress did not intend to have any hiatus between the recording and endorsing during which the mortgagee would be unprotected against the incurring of maritime liens on the vessel, for, if it did it would have used not a conjunction like "and" between the words relating to recording and indorsement in the foregoing sections but would have used some disjunctive word like "or".

With Subdivision (a) of Subsection D eliminated as it must be because it is a nullity, the entire foundation of the petitioner's claim that the *Northern Star* mortgage is not a preferred mortgage as of September 23, 1920 is removed and its argument falls to the ground. As previously shown, that elimination does not in any way destroy or materially affect the meaning of the Act because the remainder of the Act carries out the intent of Congress. Moreover, that intent being to protect the mortgagee, the elimination of Subdivision (a) of Subsection D, which is more likely to hamper than protect the mortgagee, is justified.

That elimination removes the only possible bar to preferred status of the *Northern Star* mortgage as of September 23, 1920, for, Subdivision (a) of Subsection D contains

the only language in the entire Act relating to the time when preferred status is acquired.

It is admitted that the mortgage was recorded on August 11, 1920, *Record,* p. 9, and it has been proven that a certified copy of the mortgage was placed with the ship's papers on board the steamer immediately upon her return to an American port from the high seas. *Record,* pp. 61, 95. It was the duty of the Collector of Customs to make endorsement on the ship's papers at the same time, *Record,* 65, but his failure to do so was unimportant because the placing of a certified copy with the ship's papers was more complete notice of the existence and the terms of the mortgage to anyone dealing with the vessel than a mere endorsement on the ship's papers could be.

The District Court very aptly said, *Record,* p. 65:

> "The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorsement be held to deprive the mortgage of its status as a preferred mortgage the whole purpose of Congress would fail."

Such a holding would particularly defeat the purpose of Congress in the case of American steamers plying between foreign ports only. It is common knowledge that there are no American collectors of customs at foreign ports and yet the Act says the endorsement must be made by the Collector of Customs. Consequently, if endorsement were made a *sine qua* preferred status there could not be any preferred mortgage on an American vessel plying between foreign ports, although the mortgage be recorded at the vessel's American home port and a certified copy of the mortgage be placed with the ship's papers.

With such negation as a probable result, it follows that the endorsement should not be overemphasized by making it mandatory when a certified copy has been placed with the vessel's documents.

Therefore all the material requirements for preferred status were satisfied by September 23, 1920 and the *Northern Star* mortgage should be held to have acquired preferred status as of that date.

Moreover, this result is eminently just and fair for an innocent mortgagee should not be penalized by reason of the failure of the Collector of Customs to make endorsement until some months after the recordation. The mortgagee was in no way responsible for that delay.

The Petitioner is not damaged by such a result because a bare endorsement on the ship's papers could not be any better notice to him of the existence of the mortgage and its terms than a certified copy of the mortgage itself. Such a copy was on board the steamer and the petitioner was required by statute, sub-section R, to make inquiry. If it had discharged this duty of inquiry, it certainly would have ascertained from the certified copy with the ship's papers far greater details of the terms of the mortgage than it could from a mere endorsement of the ship's papers. Likewise, the absence of endorsement did not prejudice it, so far as the Custom House records were concerned, because the mortgage had been on record there since August 11, 1920, more than two months before the repairs were made.

Since the Morse Dry Dock & Repair Company has no maritime lien anyway, it cannot be prejudiced no matter what holding this Court makes as to the status of the mortgage.

Both the District Court and the Circuit Court of Appeals sustained the respondent's contention and held that the mortgage was already a preferred mortgage at the time the petitioner's claim arose.

In passing upon this question, the District Court said, *Record*, p. 64:

> "Libellant claims that the said mortgage held by Harry Luber was not a preferred mortgage at the time that Libellant made the repairs to said steamship because it was not endorsed on the ship's papers."

It added, *Record*, pp. 65, 66:

> "The duty of endorsing the fact of the existence of the mortgage on the ship's papers is placed upon the Collector and not upon the mortgagor or mortgagee and must be done by the Collector of the home port of the vessel but if at that time she is in any other port of the United States, the endorsement may be made by the Collector of that port upon direction of the Collector of the vessel's home port, but that provision has no application in the instant case because the vessel at the time of the recording of the mortgage was on the high seas and no endorsement could have been made until her return to the United States.
>
> The first port at which the said vessel was cleared after the recording of the mortgage was the port of New York, its home port, and it was the duty of the Collector to have made such endorsement when said vessel cleared on September 22, 1920.
>
> The endorsement on the ship's papers could not be made by the mortgagee, and therefore if the failure of the Collector to make such endorsement be held to deprive the mortgage of its status as a pre-

ferred mortgage the whole purpose of Congress would fail.

That Congress realized that this situation might arise appears as the reading of the Act continues, and in construing any part of Section 30 it is necessary to construe it as a whole and therefore it did not intend to penalize the mortgagee for any failure of the collector to perform his duty, but place- the penalty on him (see subsection J) (c):

> 'If any person enters into any contract secured by, or upon the credit of, a vessel of the United States covered by a preferred mortgage, and suffers pecuniary loss * * *'

What did the libellant lose by the failure of the Collector to make the endorsement?

The mortgage was recorded in the same city where the libellant had its place of business, a certified copy was on the ship, and surely more information could be gained from an examination of the copy than from any endorsement on the ship's papers.

Bark Moshulu, 1923 A. M. C. 1091.

If the libellant suffered any loss he could recover the same from the Collector of the Port (Subsection J) (c) *supra.*

I therefore am of the opinion that the provision for endorsing the fact of the mortgage on the ship's papers is directory, not mandatory, and the mortgage in question had a preferred status from the date it was recorded, August 11, 1920.

The Nanking, 1923 A. M. C. 1191."

The petitioner appealed from this decision to the Circuit Court of Appeals, which affirmed the part just quoted from the decision of the District Court, although it differed with

the lower Court on the question whether the petitioner had a maritime lien in the first instance. In affirming the District Court's holding that the mortgage had acquired preferred status when the petitioner's claim accrued, the Circuit Court of Appeals said, *Record*, pp. 96, 97:

> "* * * The appellant attacks the validity of the mortgage as a preferred mortgage, contending that the failure to endorse it on the ship's papers before June 27th, 1921, made it invalid prior thereto as such preferred status. It had been recorded in the Custom House on August 11, 1920, and a certified copy placed on the vessel on September 28, 1920. The failure to endorse the mortgage on the ship's papers was the failure of the Collector of Customs. The Act provides for the endorsement of the mortgage on the ship's papers and Sub. Div. M provides that a lien arising prior in time to the recording and endorsement of a preferred mortgage, is a preferred maritime lien, but *these provisions must be interpreted in the light of the whole statute.* Sub. Div. D provides that such endorsement shall be made by the Collector of Customs at the port of documentation of the mortgaged vessel or upon request of the mortgagee by the Collector of Customs at the port where the vessel may be found. It will be noted that the duty is imposed upon the Collector of Customs. *When a vessel is not at her home port, the Collector of Customs at that port cannot make the endorsements on the papers and the endorsement apparently must be made in an American port. Therefore, such recordation may not be made on an American vessel which happens to be plying between foreign ports. But it evidently was the intention of the Ship Mortgage Act to protect the mortgagee even under such circumstances.* That the Act places very strongly

upon the Collector of Customs, the duty of making the endorsement, is indicated by Sub. Div. D which provides, 'and no clearance shall be issued to the vessel until such endorsement is made.' Sub. Div. J renders the Collector of Customs liable to persons entering into any contract on the credit of the vessel who have suffered any damage as a result of the Collector's failure to perform any duty required of him under the Act. *These sections indicate that it was not intended by Congress to penalize a mortgagee for the failure of the Collector of Customs to perform his duty, but placed the responsibility on the Collector.* Furthermore, liability of the mortgagor for any damage to third parties resulting from any failure upon the mortgagor's part, is provided for, and no mention is made of liability on the part of the mortgagee. It was pointed out in *The Egeria* (294 Fed. 791), that such endorsement of the mortgage was a matter with which the mortgagee had nothing to do; that it was the duty of the Collector of Customs to make the endorsement and the presumption would be, until the contrary was shown, that the Collector duly performed his duty and if there was a failure of allegation in this respect, the remedy was to except to the libel, for the defect was one which might have been cured by amendment. *The mortgagee, in the nature of things, has no control over the mortgagor or the Collector of Customs, and the Act indicates that it is not contemplated that the mortgage be invalid by reason of the failure of endorsement by the Collector. It is the intention of the Ship Mortgage Act to protect the mortgagee, not to penalize him for the failure of a government official to comply with the provisions of the Act.* All was done here that could be done by the recordation of the mortgage, the placing of it among the papers of the ship, and the delay of the Collector of Customs

in making the endorsement, to some extent excused by reason of the fact that the vessel was on the high seas, will not invalidate this mortgage as a preferred mortgage. (*The Nanking*, 1923 A. M. C. 1191, Dist. Ct. No. Dis. of Calif.; *The Oconee*, 280 Fed. 927; *The Owego*, 292 Fed. 403). *The purpose of such an endorsement manifestly is to give notice to persons having dealings with the vessels that there is a preferred mortgage upon it. Such notice was amply given by the record of August 11, 1920, in the Custom House and filing a certified copy on board the vessel with its papers on September 23, 1920.* Reasonable care and diligence by way of investigation, would have given the appellant knowledge of the mortgage and its terms before the repairs were made in November, 1920. (*United States* v. *Carver*, 260 U. S. 482; *The Princess Matoika*, 1924 A. M. C. 1033; *The Mossabee*, 1923 A. M. C. 874, C. C. A. 4th Circuit; *The Susanna*, 2 (2") Fed. 410.)"

Although the petitioner seeks to convey the impression that there is a divergence of opinion on the point, the fact is that the decisions of the various courts uniformly support the conclusions reached by the District Court and the Circuit Court of Appeals in the case at bar.

In the first place, a similar holding was made by the District Court for the Northern District of California on August 20, 1923, in *The Nanking*, 292 Fed. 641. 1923 American Maritime Cases. In that case, Judge Partridge, speaking of the effect of the endorsement, said at pages 1202 and 1203:

> "Next, that this provision of the mortgage was not and is not endorsed upon the vessels' documents as required by subdivision (1), (c) (4) and (e) of subsection 'D' of said Section 30, in that while said

purported mortgage or deed of trust included property other than the vessel, to wit, forty-eight hundred and fifty shares of the capital stock of China Pacific Steamship Company, Limited, and so forth, no endorsement was made upon the vessel's documents of a specified portion of the mortgage indebtedness.

I would be loath, indeed, to decide that people who had, in good faith, invested three-quarters of a million dollars upon both these vessels and other vessels mortgaged should be denied their right to get such of their money as they can out of the proceeds, by any strained construction of the Act. *I would be particularly loath to do that for the reason that at the time this mortgage or deed of trust was prepared the Ship Mortgage Act was a new thing.* As I remember it, this mortgage was prepared within a few weeks or at most, within a month or two after the Ship Mortgage Act became a law.

But aside from that I am convinced that the provision of the Ship Mortgage Act for the endorsement upon the papers of the vessel is merely directory and faiure to do so does not make the mortgage void • • •.

The exceptions, therefore, or so much of the exceptions to the answers as go to the constitutionality of the Act and the allegation that the mortgage in this particular case is void as it does not conform to the Act, will be sustained without leave to amend."

It will be noted that in the *Nanking* "the mortgage was not and is not endorsed upon the vessels' documents," whereas in the case of the *Northern Star* the endorsement was made upon the ship's papers eventually on June 27, 1921. Consequently the Court's holding in the *Nanking*

goes even farther than the decisions of the District Court and the Circuit Court of Appeals in the case at bar.

The foregoing interpretation is supported by a more recent decision of the Circuit Court of Appeals for the Ninth Circuit, *The Egeria* (C. C. A., 9th Circ., Dec. 17, 1923, rehearing denied Feb. 11, 1924), 294 Fed. 791. In that case, Judge Gilbert, writing the opinion for the Court, said at pages 792 and 793:

> "The copy of the mortgage filed as an exhibit to the libel contained the requisite affidavit, and while it is true that *the libel failed to allege that the mortgage was indorsed upon the ship's documents,* the absence of such an allegation is believed to be immaterial. *Such indorsement of the mortgage was a matter with which the mortgagee had nothing to do. It was the duty of the collector of customs to make the indorsement,* and the presumption would be, until the contrary were shown, that the collector duly performed his duty. And if indeed there was failure of allegation in that respect the remedy of the appellants was to except to the libel, the defect being one which might have been cured by amendment. *In line with our view of the statute are the decisions in the Oconee* (D. C.), 280 Fed. 927, and *The Owego* (D. C.), 292 Fed. 403, *holding that the statute is remedial and should be liberally construed.* In *The Oconee* case the Court said:
>
> > *'The statute itself nowhere seems to contemplate any default on the part of the mortgagee for the failure of compliance with those sections of the act to be performed by the mortgagor and the master.* The mortgagor * * * is subjected to a penalty if he fails to deliver on board the ship a copy of the mortgage. The master is likewise subject to a penalty if he fails to exhibit the same

> when called upon. *The mortgagee, in the nature of things, has no control over either, and the act clearly does not contemplate the invalidity of the mortgage by reason of such failure on their part.'"*

The effect of having a certified copy of the mortgage on board the steamer is well stated by Judge Dooling in the recent case of the *Bark Moshulu* (N. D. Cal., Oct. 10, 1923), 298 Fed. 348, as follows:

> "• • • The endorsement of the preferred mortgage claim may work an apparent hardship to the other lien claimant, but *it is to be noted that a certified copy of the mortgage was on board the vessel subject to examination* by any person having business with the vessel which might give rise to a maritime lien and that the master was bound to exhibit to any such person the documents of the vessel and such copy (subsection E, Act June 5th, 1920). *So that claimants had ample opportunity to know that any claim on their part for services rendered the vessel would be subordinate to the lien of the mortgage."*

In its endeavor to give the impression that there is a divergence of Court opinions, the petitioner cites the decision in the *Northern Wave,* 4 F. (2d) 308, and *The Bethlehem,* 4 F. (2d) 308. As a matter of fact, these cases did not in any way pass upon the preferred status of a mortgage, but the principal questions involved in them were the libellant's right to any maritime lien and the right to attack a decree *pro confesso* collaterally. The questions raised were stated by the Circuit Court of Appeals as follows:

> "The main questions arising from the whole transaction are, first whether libellants for supplies and repairs used such diligence to find the agreements of purchase and the mortgages, which contained covenants denying the owner the right to incur liens upon the ships, as would entitle them to maritime liens under the Act of 1920; and, secondly, if they did, whether the decrees *pro confesso* are subject to collateral attack and to be set aside by orders of reference to a commissioner more than four months after the date of the decrees and by renewed orders of reference made about two years thereafter, there being no question of fraud or of the lack of the court's jurisdiction."

It will be noted, therefore, that the preferred status of the mortgage was not a question before the Court.

Moreover, the Court's statement of facts shows that those cases differed materially from the case at bar in that copies of the mortgages were not carried with the ships' papers.

> "On November 20, 1920, agreements of sale of the ships were executed as of October 22, 1920, the date the ships were delivered. The purchaser also executed mortgages against the ships covering the deferred payments which were recorded at Baltimore, Maryland, the home port, on November 20, but endorsement of the mortgages on the ship's documents was not made until January 14, 1921, *nor were copies of the mortgages carried on the ships,* as required by the Ship Mortgage Act of 1920 to give them the status of preferred mortgages."

The petitioner's discussion of *The Oconee,* 280 Fed. 927, is also irrelevant. *Petitioner's Brief,* page 24. The fact that the Court in that case did "not expressly or impliedly

undertake to excuse the failure to have the mortgage endorsed'' is explained by the petitioner's own statement on page 23 of its brief that ''the preferred status of the mortgage was attacked in *The Oconee* case for the failure to comply with the provisions of Subsection E • • •'' which subsection requires the placing of a certified copy of the mortgage with the ship's papers. There was no occasion, therefore, for Judge Groner to pass on the effect of endorsement in *The Oconee* and anything he might have said would have been only *obiter dictum.*

Moreover, it has been unquestionably proven that a certified copy of the mortgage was placed with the ship's papers in the case of *The Northern Star.*

Consequently there is no divergence of Court opinions as the petitioner seeks to imply. This is confirmed by the statement in its brief at page 18 ''that we are unable to cite in support of our contention any cases exactly in point • • •.''

So far from there being any divergence of opinion, all the Courts that have passed upon the question have uniformly held that the requirements for endorsement are directory, not mandatory, and that the failure to comply with the provisions of Subdivision (a) of Subsection D does not deprive the mortgage of preferred status.

The fact that there is such a uniformity of opinion in favor of the respondent's contentions is all the more reason for treating Subdivision (a) of Subsection D as a nullity, which in fact it is anyway, particularly since it is inconsistent with Subsections F and M.

The petitioner itself impliedly admits that the requirements of Subdivision (a) are directory at the best, even if

that subdivision is given any effect, when it says of Subsection E relating to the placing of a certified copy of the mortgage with the ship's papers: "This provision is directory merely and has to do with the handling of the mortgage after it has been recorded." Obviously if the placing of a certified copy on board the ship, which copy gives full details of the provisions of the mortgage copy, is only directory then the making of a bare endorsement, which gives no details of the mortgage's provisions is also directory.

It is respectfully submitted, therefore, that the *Northern Star* mortgage had preferred status as of September 23, 1920, the date that a certified copy was placed on board the ship, since from that date on anybody exercising the slightest diligence could learn the full terms of the mortgage more satisfactorily than from a mere endorsement on the ship's papers, which are always carried with the vessel anyway.

II. There is no possible doubt that the mortgage acquired preferred status, at least, as of June 27, 1921, the date of its endorsement.

By June 27, 1921, all the steps described in the Ship Mortgage Act were completed. The mortgage had been recorded on August 11, 1920. *Record,* p. 9. A certified copy had been placed with the ship's papers on September 23, 1920, and had remained there continuously up to the date of the marshal's sale. *Record,* pp. 62, 95. The endorsement was made on the ship's papers on June 27, 1921. *Record,* p. 9.

Consequently, there was nothing left that the most meticulous objector could require to give the mortgage pre-

ferred status. It follows that it had such status beyond any doubt as of June 27, 1921.

III. Even if it is assumed that the Morse Dry Dock & Repair Company has a maritime lien and that the mortgage did not acquire preferred status until June 27, 1921, the repairman's lien is not a preferred maritime lien within the meaning of the Ship Mortgage Act and therefore does not take priority over the preferred mortgage lien.

In order to demonstrate that, in no event, can the claim of the Morse Dry Dock & Repair Company be superior to the claim of the holder of the mortgage, let us assume, for purposes of argument only, that the petitioner has a maritime lien. As has been previously shown, the mortgage had preferred status at least as of June 27, 1921. Consequently it constitutes also a maritime lien.

The situation then under the foregoing assumption would be that there are two maritime liens and the question arises as to which is the junior lien.

The Ship Mortgage Act provides in Subsection M, Subdivision (b) that upon the sale of any mortgaged vessel by order of a District Court "the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the Court." 41 Stat. 1004.

Therefore, if the assumed lien of the Morse Dry Dock & Repair Company is to have priority over the preferred mortgage lien, it must be shown to be a "preferred maritime lien."

(a) *A preferred maritime lien is one that arose prior in time to both the recording and the endorsement of the preferred* ***mortgage.***

A "preferred maritime lien" is defined in Subsection M (a) as "(1) a lien arising prior in time to the recording *and* indorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage."

A mere examination of the foregoing provisions makes it obvious that the petitioner's claim does not fall within the definition given under the numeral (2). Therefore if the petitioner is to have a preferred maritime lien, it must be on the basis of its claim having accrued prior "to the recording and indorsement."

There is only one possible interpretation of this provision and that is that the claim to be a preferred maritime lien must have arisen before both the recording and endorsement. If it arose before the endorsement but after the recording, that is not sufficient. The language is too clear to permit of any doubt on that ground and the cases cited by the petitioner in its brief on pages 37 and 38 establish the obvious fact that "and" means "and" and not "or". They are sufficient authority against changing the word "and" to "or" by judicial interpretation.

If this Court should hold that a claim that arose after recording but before indorsement is a preferred maritime

lien, it would in effect be transgressing upon the legislative functions of Congress and by its decision would be changing the Ship Mortgage Act by substituting "or" for "and" between the words "recording" and "indorsement". It is confidently asserted that no Court should do this.

(*b*) *The Morse Dry Dock & Repair Company does not have such a preferred maritime lien.*

As a matter of fact, the mortgage was recorded on August 11, 1920. The repairs which are the basis of the claim of the Morse Dry Dock & Repair Company were furnished between November 14, 1920 and November 27, 1920. *Record*, p. 9. The endorsement was made June 27, 1921.

Consequently the repairs were made after the recordation and before the endorsement. Since the Act says that a preferred maritime lien is one that arose prior in time "to the recording *and* endorsement", the petitioner cannot have any preferred maritime lien.

Since the Act further provides that after marshal's sale "the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed by the Court", 41 Stat. 1004, it follows the respondent's preferred mortgage lien has priority, even if the petitioner is assumed to have a maritime lien.

LAST POINT.

THE DECREE OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED SO AS TO DENY THE MORSE DRY DOCK & REPAIR COMPANY A MARITIME LIEN AND AS MODIFIED THE DECREE SHOULD BE AFFIRMED.

It is too well established to require the citation of authorities that the review by this Court of a case in admiralty constitutes a trial *de novo*.

Since it has been established that the Morse Dry Dock & Repair Company cannot have a maritime lien, because there was no pledge of the vessel's credit and none can be presumed on account of the restrictions against liens contained in the agreement for sale and the preferred mortgage, the Circuit Court of Appeals should be instructed to modify its decree so as to provide that the petitioner has no maritime lien whatever.

Since it has also been established that the mortgage has preferred status as of September 23, 1920 and since there can be no doubt that it had such status as of June 27, 1921, the remainder of the decree of the Circuit Court of Appeals giving the respondent a preferred mortgage lien and priority of that lien over the claim of the petitioner should be affirmed.

Respectfully submitted,

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New York City, May, 1926.